(2)

No. 04-1169

IN THE

Supreme Court of the United States

SANDRA WHEATLEY and JANE GROGAN,

Petitioners,

v.

WICOMICO COUNTY, MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

THOMAS J. ALTHAUSER
Counsel of Record
SHIRLIE NORRIS LAKE
ECCLESTON AND WOLF, P.C.
729 East Pratt Street, 7th Floor
Scarlett Place
Baltimore, Maryland 21202
(410) 752-7474

Attorneys for Respondent

193679

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether, under the Equal Pay Act and Title VII, jobs classified in a "classified pay plan," without additional evidence, can be used to show a disparity in pay.

2. Whether the Court of Appeals for the Fourth Circuit erred in holding that a trial court may decline to consider a theory raised for the first time in response to a motion for judgment, when said theory had not been raised in the pleadings or in opening statement to the jury.

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INTRODUCTION

The trial court ruled, and the Court of Appeals has affirmed, that the Petitioners' case, and the evidence relied upon, are insufficient to sustain a cause of action under the Equal Pay Act, 29 U.S.C. § 206, or Title VII, 42 U.S.C. § 2000e. The United States Court of Appeals for the Fourth Circuit also ruled that the United States District Court for the District of Maryland is authorized to effectuate its case management function in the interest of justice by prohibiting "trial by ambush" tactics. The Fourth Circuit noted the trial court has the authority to prevent parties from raising a last minute "surprise" theory of recovery after resting its case so as to prevent prejudice to adverse parties. These are proper decisions within the authority of these courts, and they do not pose a question sufficient for review by this Court.

The trial court in the present matter evaluated the case, and it properly determined that Petitioners' evidence did not meet the standards required under the Equal Pay Act and Title VII to sustain a claim. Petitioners simply disagree with the court's application of the law to the facts specific to this case. There is no conflict between the circuits, nor is there any important Federal question on this issue previously undetermined for this Court to address.

The trial court determined that the Petitioners failed to demonstrate substantial equality or similar situation between their positions and the positions compared to support their claims under the Equal Pay Act and Title VII respectively. The trial court found that Petitioners had failed to sustain a *prima facie* case under the theory that Petitioners' jobs were substantially equal or similarly situated to those of other

department directors and deputy directors. Petition for Writ of Certiorari, Appendix B, at 38-39. There simply was an insufficient showing of substantial equality or comparability under the EPA or Title VII.

The "classified pay plan" in the present matter was also deemed insufficient to sustain Plaintiffs' cause of action because Petitioners failed to introduce any evidence comparing the jobs/positions in the same "grade" as Petitioners, and, therefore, they could not establish the necessary equality or similarity between them. Petition for Writ of Certiorari, Appendix B, at 40-41. A decision must be made on a case-by-case basis, after an evaluation of the scale, the positions compared, and the tasks and responsibilities of each. Petitioners simply disagree with the application of the well-settled law by the trial court.

The Court of Appeals for the Fourth Circuit upheld the trial court's decision with regard to Petitioners' failure to sustain a *prima facie* case on the theory of equality and comparability between the Petitioners and male department directors and deputy directors. *Wheatley v. Wicomico County*, 390 F.3d 328, 334 (4th Cir. 2004). The Fourth Circuit declined to rule on the trial court's determination that the classified pay plan scale was also insufficient in supporting Petitioners' claims. The Fourth Circuit did not need to reach that issue because it determined that Petitioners did not timely raise the issue, and as such, the trial court was not required to substantively address it, although it had. *Id.* The Fourth Circuit approved the trial court's case management authority to avoid "trial by ambush" tactics that are clearly disfavored. Despite Petitioners' attempt to cast the actions of the trial court and Fourth Circuit as improvidently expanding an appellate rule to the trial court level with detrimental effect,

the Fourth Circuit's decision merely affirmed the long standing principle of a trial court's authority to prevent last minute "surprise" tactics at trial by one party that would prejudice the adverse party's case.

Petitioners fail to identify any specific criteria or rationale that the issues raised are worthy of consideration by this Court. Petitioners fail to specifically allege, much less demonstrate, any distinct split among the circuits, pressing issue of unresolved federal law, or action taken contrary to prior decisions of this Court. The matters presented to the Court are not of the nature or type properly suited for review by this Court. Consequently, a Writ of Certiorari should not be granted.

STATEMENT OF THE CASE

On June 8, 2001, Appellants, through their attorney, Francis J. Collins, Esquire, filed a two count Complaint, alleging violations of Title VII and the Equal Pay Act.[1] The Complaint alleged that Plaintiffs are two of the few female directors and deputy directors of departments in Wicomico County, Maryland government, and that the County displays a pattern and practice of paying all such high-level female employees less than similarly situated male employees. In addition, Plaintiffs alleged that, for at least the past three years, they have been paid substantially less than the male directors and deputy directors of departments in Wicomico County government, and that Defendant has made this distinction because Plaintiffs are female.

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1. Appellants filed Charges with the EEOC in September of 2000, and on March 12, 2001, the EEOC sent each a Dismissal and Notice of Rights.

Trial began in the United States District Court for the District of Maryland before a jury with the Honorable J. Frederick Motz, presiding, on October 20, 2003. At the conclusion of Plaintiffs' case, on October 22, 2003, Defendant made a Motion for Judgment as a Matter of Law on the basis that Plaintiffs had failed to prove a *prima facie* case of a violation of either the EPA or Title VII. Judge Motz granted that Motion on the basis that Plaintiffs had failed to identify a specific male comparator as required under the EPA, rejecting Plaintiffs' argument that all Wicomico County department heads are the same. Petition for Writ of Certiorari, Appendix B, at 38-40. He noted that Plaintiffs had failed to present any evidence regarding a specific male director or deputy director whose job was comparable to theirs. Accordingly, Judge Motz found that there was "simply a total failure of proof" on Plaintiffs' EPA claim. *Id.* Furthermore, he held that Plaintiffs had failed to put on any evidence regarding the skill, effort, responsibility and working conditions of any other director and/or deputy director position. Judge Motz also held that Petitioners failed to present any evidence to support the last minute argument that their jobs were substantially equal to the jobs of male County employees in the same pay grade. *Id.* Finally, Judge Motz held that Plaintiffs had failed to prove a *prima facie* case of discrimination under Title VII.

Petitioners appealed the trial court's decision to the Court of Appeals for the Fourth Circuit. The Fourth Circuit affirmed the trial court's decision that Petitioners failed to make out a *prima facie* case on the basis of equality of the jobs of department heads throughout Wicomico County, i.e. performing *substantially equal* duties, as contemplated by the EPA or being similarly situated as contemplated by Title VII. The Fourth Circuit noted that the trial court found

Petitioners' argument to be deficient, and the Fourth Circuit agreed. The Court of Appeals for the Fourth Circuit specifically declined to accept the notion that employees with the same titles and general similar responsibilities must be considered "equal" under the Equal Pay Act. The Fourth Circuit stated that the Petitioners had failed to establish that their jobs and the jobs of other male department heads involved substantially equal responsibilities.

The Fourth Circuit declined to address the merits of Petitioners' last minute argument – that they could rely upon the classified pay plan scale adopted by Wicomico County to demonstrate "substantially equal" work between Petitioners and male County employees of the same grade. Although the trial court specifically found the Petitioners' case deficient under this theory as well, the Fourth Circuit affirmed the trial court's decision on the grounds that Petitioners failed to raise such an argument or theory in a timely manner. The Fourth Circuit noted that the theory came "too late in the day for the case to be fairly tried on it." *Wheatley v. Wicomico County*, 390 F.3d 328, 334 (4th Cir. 2004). Petitioners filed a Petition for Panel Rehearing *en banc*. The Petition for Rehearing, however, was denied.

Petitioners have now filed a Petition for Writ of Certiorari in this Court.

REASONS FOR DENYING THE PETITION

1. Petitioners Fail To Advance Any Recognized Justification For Review Under Rule 10

Rule 10 of the Rules of the Supreme Court of the United States sets forth the criteria governing review and the granting certiorari. The Rule illustrates numerous guideposts for determining justification for review by this Court. The factors set forth in Rule 10 include the following:

> 1. There exists a conflict between a decision of one United States Court of Appeals and that of another on the same important matter;
>
> 2. A decision of one United States Court of Appeals on an important federal question conflicts with a decision by a State Court of last resort;
>
> 3. A United States Court of Appeals has issued a decision that drastically departs from the accepted and usual course of judicial proceedings, or sanctions such departure by a lower court;
>
> 4. A United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with the relevant decisions of this Court.

See Sup. Ct. R. 10. Rule 10 also states that a Petition for Writ of Certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Petitioners fail to demonstrate that the issues raised implicate any of the criteria set forth in Rule 10. First, Plaintiffs do not claim that there is a split among the circuits with regard to any of the issues raised in this matter. Additionally, Plaintiffs do not identify an important question of federal law, as the term is used in Rule 10. Finally, Petitioners fail to identify any departure from the usual course and proceedings, so as to require the supervisory powers of this Court to intervene.

Petitioners' claims are nothing more than that the courts below misapplied proper law. Petitioners assert that the trial court should have found that the classified pay plan was sufficient evidence of "substantially equal" work under the EPA and similarity of situation under Title VII.[2] Petitioners attempted to pursue their causes of action based upon the theory that the disparity between the male and female employees of Wicomico County could be demonstrated by the differences between the salaries of male County employees and those of Petitioners in the same grade under the classified pay plan; however, this theory was not raised until oral argument on Respondent's Motion for Judgment.[3]

2. In support of their contention, Petitioners make the conclusory allegation that the classified pay plan is an admission on the part of Respondent that the positions are substantially equal. (Petition for Certiorari at 12). Petitioners, however, provide no support or authority for the contention that such a document constitutes an admission.

3. Respondent moved for judgment on the basis that Petitioners failed to establish a *prima facie* case based on the theory espoused to that point, namely that all department directors and deputy directors of departments served as comparators under the statutes in that the work was substantially equal. Respondent asserted there was insufficient similarity, and judgment was, accordingly, proper.

Petitioners seek to assail the trial court's finding that the classified pay grade plan was insufficient to establish substantial equality of work under the EPA or similarity of situation under Title VII. The trial court indicated the plan was insufficient because Petitioners had not compared their jobs to those of any individual's job in the same pay grade, and they now attempt to attack this threshold evidentiary ruling by the trial court. The Court did not decide an issue of law contrary to this Court or any other in making its determination. It merely applied the valid law in effect. Indeed, what Petitioners seek to attack is the application of the law. However, under Rule 10, that is not a proper basis for the grant of a Writ of Certiorari.

The same is true of Petitioners' claim that the Fourth Circuit improperly adopted for the trial court the appellate rule that issues may not be initially raised on appeal. In raising this point, Petitioners fail to identify any authority, whatsoever, which supports their position that such a ruling is improper or inconsistent with the accepted practices and procedures maintained throughout the courts. Petitioners identify no decision from this Court or any Court of Appeals determining that such action is improper. Therefore, it cannot be said that such action on the part of the trial court, and the affirmation thereof by the Fourth Circuit, is a departure from the accepted procedures so as to require the intervention of this Court in its supervisory role.

The Fourth Circuit merely reaffirmed the trial court's well-accepted function of case manager. Although the trial court considered Petitioners' 11th hour theory, and rejected it on its merits, the Fourth Circuit did not reach this issue because it determined that it had been raised too late. The trial court was not required to permit the Petitioners to

pursue a previously unraised theory of the case only after having realized that the Court did not accept that t[illegible]evidence presented supported Petitioners' original theory. T[illegible] Fourth Circuit determined that the trial court was merely serving to preclude Petitioners from engaging in conduct consistent with surprise, or "ambush" tactics. There is no novel issue of law in this regard. Petitioners attempt to characterize the Fourth Circuit's affirmation of routine case management function as something more expansive and far reaching in an attempt to salvage their claims.

2. This Court Need Not Decide Whether A Classified Pay Plan May Be Used As Evidence Of Discrimination Under The Equal Pay Act And Title VII

Petitioners assert that this Court should determine whether a "classified pay plan" may be used to establish discrimination under the EPA and Title VII, and that this Court has not decided such issue previously. Petitioners sum up their position in their Petition by asserting: "In short, the Petition for Writ of Certiorari should be granted because there are no reported cases that make clear that jobs classified within the same grade are considered comparable under the Equal Pay Act." Petition for Writ of Certiorari, at 14.

Petitioners' own characterization demonstrates its fatal flow. Petitioners seek a ruling from this Court that jobs classified within the same pay grade should be considered substantially equal under the Equal Pay Act. However, Petitioners cite no justification for this proposition. Petitioners do not claim that such matter is an important question of federal law. They do not claim that there is existing authority that holds a contrary ruling. The Petitioners do not even assert that either the trial court or the Fourth

Circuit held that jobs classified within the same grade might never be considered substantially comparable under the Equal Pay Act.

The trial court did not make a determination that such classified pay grade plans may never be used. Rather, the Court relied on the extensive body of case law setting forth, and defining the standards to be applied to EPA cases. The trial court, in making its determination, made a finding that it was necessary for the Petitioners to establish that the positions in the same pay grade being compared were "substantially equally." To demonstrate a *prima facie* case under the EPA, it is necessary that an employee demonstrate that the skill, effort, and responsibility required in the performance of the employee's job is substantially equal to that of a male. *Pearce v. Wichita County*, 590, F.2d 128 (5th Cir. 1979). As the Petitioners have noted, it is sufficient if there is "substantial identity" in the skill, effort, and responsibility required for the tasks performed. *Hodgson v. Fairmont Supply Co.*, 454 F.2d 490, 493 (4th Cir. 1972). Titles and position names are not of much assistance in this regard. Rather, the inquiry and analysis will focus on the duties themselves. The question is whether the jobs being compared demonstrate the necessary "common core" of tasks that make a "significant portion" of the two jobs identical. *Brewster v. Barnes*, 788, F.2d 985, 991 (4th Cir. 1986). It is this very analysis and framework that makes the present case unsuited for review by this Court.

Making determinations of adequate comparators under the EPA is necessarily done on a case-by-case analysis. *Brewster*, at 991. Therefore, although Petitioners assert that a grant of Certiorari is necessary, so that a ruling can be made that jobs in the same pay grade under "classified pay plans"

are comparators under the EPA, the existing case law is contrary to such a blanket proposition. The law on this matter is already well settled: each case must be assessed and evaluated in its own right. The specific job or position being held out as comparable needs to be independently evaluated. There must be a determination of the two positions, side by side, to determine whether the necessary "common core" of tasks exists. Therefore, there can be no blanket ruling indicating that jobs in the same pay grade in "classified pay plans" are comparators under the EPA. Such a *per se* rule would contradict existing case law.

The executive regulations promulgated pursuant to the statutory enactments at issue demonstrate this. 29 C.F.R. § 1620.13 of the Federal Regulations promulgated in connection with the Equal Pay Act states in pertinent part:

> Job content controlling. Application of the equal pay standard is not dependent on job classifications or titles but depends rather on actual job requirements and performance. For example, the fact that jobs performed by male and female employees may have the same total point value under any evaluation system in use by the employer does not in itself mean that the jobs concerned are equal according to the terms of the statute.

29 C.F.R. § 1620.13(e).

As the regulation makes clear, the institution of a pay plan does not, of itself, constitute comparability under the Equal Pay Act. This is consistent with the well-settled case law establishing that the jobs, themselves, must be compared

based on the core of tasks, and the identity thereof, rather than simply based upon job titles, point classifications or some other artificial means of comparing positions. Therefore, there is no need for this Court to review this issue on certiorari.

At best, Petitioners' claim is that the trial court misapplied existing law regarding the applicability of classified pay plans as evidence in discrimination matters. However, such a contention is not a proper basis for granting the Writ under the guidelines established in Rule 10.

3. The Fourth Circuit Decision Was A Correct Affirmation Of The Trial Court's Case Management Authority, Serving To Prohibit "Surprise" Or "Trial By Ambush" Tactics

Petitioners attempt to characterize the decision of the Fourth Court as an expansive, far-reaching attempt to apply an appellate procedural rule to trial court level proceedings, claiming that this is inconsistent with the procedures normally accepted by the courts. Petition for Writ of Certiorari at 15 – 16. However, the Fourth Circuit properly ruled that the trial court was carrying out its accepted role of supervising the case management of its docket. *ADC Telecommunications, Inc. v. Thomas & Betts Corp.*, 2001 U.S. Dist. LEXIS 17796 (D. Minn. 2001). The court is charged with doing so in the interest of justice. Petitioners assert that the Fourth Circuit erred by applying to the trial court level the appellate rule that an issue may not be raised for the first time on appeal when the court refused to permit Petitioners to pursue a theory of recovery that had not been previously disclosed to the court or the Respondent in the course of pleadings, or to the jury in Petitioners' opening statement. *Id.* Petitioners assert that

the Fourth Circuit Opinion "creates a new procedural requirement for litigants that is truly ground breaking," which should be reviewed by this Court. *Id.* In fact, although during oral argument the trial court indicated that the new theory had been raised too late in the trial, the trial court nonetheless did consider the alternate theory, and found it substantively insufficient.[4] However, the Fourth Circuit relied on the trial court's authority to not even consider the "new" theory in affirming the decision.

The trial court noted that Petitioners had failed to properly and timely raise the theory that recovery was permitted under the EPA on the basis of the "classified pay plan." Rather, Petitioners had pursued their case under the single theory that the Petitioners' positions were comparable to those of male department heads and deputy department heads. Upon the completion of Petitioner's case-in-chief, Respondent filed a Motion for Judgment and argued that Petitioners had failed to meet their burden under the theory that their positions were substantially equal to that of the male directors and deputy directors in the County. When the trial court agreed with Respondent on this issue, counsel for

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4. Judge Motz held as follows:

> And the plaintiffs did not meet their burden. The same is obviously true to the argument made by Mr. Collins just now, that, well, you can use the Hendricks Study and compare, for example, Ms. Wheatley to everybody else in grade 17. There has been no, no evidence, for example, about the airport manager. If the plaintiffs' theory is that that was a comparable job, there would have to be some comparability there.

(Petition for Writ of Certiorari, Appendix B, at 40)

the Petitioners advanced a new theory – that Petitioners' positions were equal, for the purposes of the statutes, to other positions in the same grade in the "classified pay plan." After noting that the Petitioners had not given notice of such theory of recovery in either the pleadings or in their opening statement to the jury, the trial court substantively addressed the second theory, and found it insufficient to support Petitioners' claims as well. Consequently, such a theory had not been properly disclosed to the court or the Respondent and, additionally, the theory was substantively insufficient.

Despite Petitioners' characterization to the contrary, the Fourth Circuit merely affirmed a trial court's routine authority. Trial courts are left with the discretion to identify and handle case management functions. *Rosario-Diaz v. Gonzalez*, 140 F.3d 312, 315 (1st Cir. 1998). It is a proper exercise of a trial court's discretion to prevent trial by ambush and to ensure that all parties have an ample opportunity to properly prepare their case for trial. Responsible case management by a court requires no less. *ADC Telecommunications, Inc. v. Thomas & Betts, Corp.*, 2001 U.S. Dist. LEXIS 17796 (D. Minn. 2001). Reversible error results from unfair surprise where the Court permits the Plaintiff to add a completely new basis for damages on the eve of trial. *Valdes v. Leisure Resource Group, Inc.*, 810 F.2d 1345, 1357 (5th Cir. 1987) (citing *Shelak v. White Motor Co.*, 581 F.2d 1155 (5th Cir. 1978)). The *Valdes* Court explained that the new theory espoused by the Plaintiff served to prejudice the Defendant. Specifically, the Court determined that a Defendant was severely prejudiced when the Judge allowed the jury to consider evidence on a theory of damages never properly incorporated into the Plaintiff's case, and that the Federal Rules of Civil Procedure are intended to avoid this result. *Valdes*, at 1357 (citing *Woods ex rel. v. International Harvester Co.*, 697 F.2d 635, 639 (5th Cir. 1983)). To permit a Plaintiff to switch his theory of the

case after the trial ended would mean that the Defendant would face the possibility of being held liable under a claim that Defendant had no opportunity to evaluate and defend against. *Flannery v. Carroll*, 676 F.2d 126, 131 (5th Cir. 1982). (court denied Motion for Judgment and prohibited plaintiff from pursuing state securities law cause of action with longer limitation period after jury had specifically assessed evidence under original federal securities claim with shorter limitations, finding culpable activity on the part of defendant, but that limitations had run). Thus, courts routinely undertake to monitor case management, precluding the raising of new issues and theories at the 11th hour, so as to avoid prejudice to the opposing party, and to avoid, generally, "trial by ambush."

The case law is legion on this issue in numerous contexts. In the case of *ESPN, Inc., v. Office of the Comm'r of Baseball*, 76 F. Supp. 2d 416 (S.D.N.Y. 1999) the court addressed a similar issue in the framework of a Motion in Limine. Specifically, at the end of oral argument on the Motion, the Commissioner of Baseball offered a new theory of damages in connection with its claim of breach of contract on the part of ESPN for pre-empting several television broadcasts in violation of the broadcasting contract. The court determined that the Commissioner's failure to mention this alternate theory of damages until six days before the trial barred it from presenting such a theory at trial. *Id.* at 420; *See also Point Productions v. SONY Music Entertainment, Inc.*, 2002 U.S. Dist. LEXIS 24450 (S.D.N.Y. 2002) where Plaintiff was precluded from asserting a new damage theory when it failed to do so in the course of the pleadings and discovery, and only raised the theory shortly before a scheduled trial date.

In addition, such management functions often occur in the context of expert testimony, and those cases, too, are analogous to the present case. For example, in *Lamonds v. General Motors, Corp.*, 34 F. Supp. 2d 391 (W.D. Va. 1999), the court addressed the propriety of the Plaintiff introducing a new factual basis for a theory of causation through the use of supplemental expert testimony. The court discussed the competing interests of the Federal Rules of Civil Procedure and the doctrines of judicial estoppel and judicial admission. Specifically, the court noted that the Federal Rules of Civil Procedure, in part, serve to ensure that civil trials seek out the truth, and that this important goal is met by avoiding trial by ambush. Although the introduction of the new theory was deemed to fall short of trial by ambush, the court was of the opinion that the new theory did not serve the goals of the Federal Rules of Civil Procedure, and, accordingly, did not permit the new theory to proceed, given that over two years had passed since the filing of the suit. The court also noted that the doctrines of judicial estoppel and judicial admission attempt to protect the integrity of the court's judicial process. At times, the policies advanced by the Federal Rules and those of the estoppel doctrines will clash, and the trial court is vested with the discretion and authority to resolve these matters and must do so after carefully considering the totality of the circumstances. *Id.* at 396.

Courts routinely require that the parties present all issues and theories so that such issues are known to all parties. This is precisely the function served by pre-trial conferences and pre-trial orders. Courts have prohibited parties from raising issues or theories not raised in the course of the pre-trial conference and set forth in the pre-trial order. If scheduling orders are to serve any meaningful purpose, it is a proper exercise of the trial court's discretion to prevent trial by

ambush and ensure that all parties have an ample opportunity to prepare their cases for the scheduled trial date. *ADC Telecommunications, Inc., v. Thomas & Betts Corp.*, 2001 U.S. Dist. LEXIS 17796 (D. Minn. 2001). Unless pre-trial orders are honored and enforced, the objective of the pre-trial conference to simplify issues and avoid unnecessary proof by obtaining admission of fact will be jeopardized, if not entirely nullified. The parties need offer no proof at trial as to matters agreed to in the order, nor may a party offer evidence or advance theories at the trial which are not included in the order or which contradict its terms. Disregard of these principles would bring back the days of trial by ambush and discourage timely preparation by the parties for trial. *United States v. First Nat'l Bank*, 652 F.2d 882, at 886 (9th Cir. 1981). In the present case, the trial court indicated that the newly raised theory was not previously articulated in the Pre-Trial Order. This is evident by the court expressing "surprise" to the theory when it was raised. Therefore, this was not a theory or issue contemplated by the pre-trial order in the mind of the trial judge.

The Fourth Circuit did nothing more than affirm a trial court's authority to effectuate and carry out its case management function as described in the myriad of cases above. A party may not attempt to raise an issue or theory in an attempt to surprise or ambush an opponent or the court. Petitioner's attempt to raise an alternate theory of recovery after the *Petitioners had rested their case*, would serve to do just that. Petitioners had not tried their case on the basis of this alternate theory, nor had Respondent prepared a defense to this theory. As is the case with late changes in expert testimony or supplementation, a trial court is not required to permit attempts to stray from the issues upon which the case proceeded in discovery and was tried by the addition of new theories of liability or damages at the 11th hour.

Petitioners' arguments that the Fourth Circuit's ruling will wreak havoc throughout the circuits misstates the impact of such a decision. The Fourth Circuit ruling merely served to reinforce the accepted notion that parties may not raise new claims, issues or theories at the 11th hour, to the surprise and detriment of opposing parties and the court. This ruling is totally consistent with previous rulings of this Court, and other appellate courts.

Despite Petitioner's assertion that the actions of the trial court deviated substantially from the procedures normally carried out in other courts, Petitioners cite no authority for such position. On the other hand, the prohibition of "trial by ambush" tactics is well accepted, and the means that the court chooses in doing so is within its discretion. The Fourth Circuit's affirmation in the present case does not constitute an important federal question upon which this Court needs to rule, nor does this action constitute any contradiction with a decision of this Court or any other Court of Appeals ruling. Consequently, no rationale supporting the grant of the Writ on this basis has been established by the Petitioners and, therefore, the Writ should be denied.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

THOMAS J. ALTHAUSER
Counsel of Record
SHIRLIE NORRIS LAKE
ECCLESTON AND WOLF, P.C.
729 East Pratt Street, 7th Floor
Scarlett Place
Baltimore, Maryland 21202
(410) 752-7474

Attorneys for Respondent